UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KEVIN O'LOUGHLIN, **Plaintiff,** **v.** **DOMINICK'S FINER FOODS,** **Defendant.**	**Case No. 99 C 8301** **Judge Harry D. Leinenweber**

MEMORANDUM OPINION AND ORDER

Kevin O'Loughlin filed this action against Dominick's Finer Foods ("Dominick's") alleging discrimination in violation of the Americans' with Disabilities Act (the "ADA"), 42 U.S.C. § 12101 et seq. Dominick's now moves for summary judgment.

BACKGROUND

Dominick's employed O'Loughlin as a stock clerk ("stocker") from April 1978 until sometime after July 10, 1996. In 1996, O'Loughlin worked at Store No. 51 in Palos Heights, Illinois, as a stocker on the night shift in the grocery department. Peter Klingen was the Store Manager, and Sam Nicastro was the Co-Store Manager at Store No. 51. According to Dominick's written job description, a stocker's typical functions included:

- Accurate operation of cash register;
- Able to achieve company productivity standards;
- Project positive company image;
- May require stocking, shelf tag maintenance, blocking, or building of displays;

- Assist customers on product location;
- May entail proper ordering and inventory control;
- Maintain back room organization and maintenance;
- Maintain proper safety standards;
- May require the receiving of merchandise.

The written job requirements included were listed as:

- Friendly, must enjoy contact with customers & co-workers;
- Must be able to communicate with customers, supervisors, peers, and others;
- Reliability;
- Flexible hours;
- Frequent lifting involved.

Despite these descriptions, both Nicastro and Klingen testified during their depositions that these functions were not always enforced at Store No. 51.

In practice, O'Loughlin helped unload delivery trucks, which involved placing various products on wheeled pallets that were then maneuvered around the store with a hydraulic hand jack. The pallets could weigh up to 100 pounds, although stockers never had to actually lift the pallets themselves. Stockers also moved grocery goods about the store on six-wheeled trucks. When using the truck, clerks unloaded the products from the pallet, placed them on the truck, pushed the truck into the sales area, and stocked the shelves. The weight of the products the clerks had to lift when placing them on the truck could range up to 60-80 pounds. The amount of lifting done during any given shift varied depending on the number of stockers scheduled

to work and the size of the delivery load, but O'Loughlin asserts that he rarely had to lift loads of 40 pounds or more. In addition to stocking products, stockers were required to clean and "face" grocery products, which involved pulling the product up to the front of the shelf to give it a neat appearance.

In January 1996, O'Loughlin was hospitalized for surgery to replace a defective pacemaker. During his hospitalization, Dr. Diane Wallis, his cardiologist, diagnosed O'Loughlin with Marfan's Syndrome. O'Loughlin underwent open-heart surgery, during which the surgical team inserted a permanent pacemaker and an aortic valve replacement into his heart.

At her deposition, Dr. Wallis testified that Marfan's Syndrome is a disorder affecting all the connective tissues in the body, including the eyes, skeleton, joints, heart valves, and aorta. People with Marfan's Syndrome have a 50% chance of passing the disorder on to their offspring, and before modern treatments were developed, people with Marfan's Syndrome could expect to live only to their mid-30's.

In a person with Marfan's Syndrome, normal heart beats can cause the aorta to stretch and tear. Eventually, the aorta may rupture and burst, killing the victim. Such a catastrophic event may be triggered when someone with Marfan's Syndrome

engages in an activity that causes them to strain or overexert themselves. Dr. Wallis therefore counsels patients with Marfan's Syndrome to avoid activities such as heavy lifting, pushing, or pulling that causes them to strain such that they would hold their breath. The point at which a person has to strain to accomplish a task varies with each patient, depending on the person's fitness level.

Although she did not have O'Loughlin's patient records with her during the deposition, she testified that she probably explained to O'Loughlin that he must avoid any activity that requires him to strain. She remembered O'Loughlin explaining his job as a stocker, and she testified that the only duties which concerned her were the lifting of heavy boxes. Together, she and O'Loughlin decided that he should limit his heavy lifting to objects of 40 pounds or less. She also testified at her deposition that she gave him a note for his employer indicating only the 40-pound lifting restriction and released him to return to work in July 1996. O'Loughlin does not recall Dr. Wallis explaining that he must avoid any activity that requires him to strain, and he believed that the only restriction on his activities was the 40-pound lifting restriction.

When O'Loughlin returned to work in July 1996, he informed Nicastro and Klingen of the 40-pound lifting restriction, and he may have told them that he could no long push heavy loads. Although Nicastro and Klingen both testified that they offered O'Loughlin the opportunity to perform light duties, O'Loughlin maintains that they did not offer him any work after Dr. Wallis released him to return in July. According to O'Loughlin's EEOC charge, Nicastro told O'Loughlin that he would not be allowed to return to work because he was too "high risk" to employ.

Nicastro and Klingen state that they brought O'Loughlin's situation to Petroff's attention, and Petroff testified that he told Klingen to try to find O'Loughlin a position in Store No. 51. Petroff also allegedly told them that there were no other positions available for O'Loughlin at another store. Nevertheless, neither Nicastro nor Klingen ever scheduled O'Loughlin to work again, nor did they sit down with O'Loughlin and attempt to find a solution to the dilemma. They maintain that O'Loughlin rejected their offers to perform lighter work, a claim O'Loughlin denies.

O'Loughlin filed a Charge of Discrimination against Dominick's on May 1, 1997, alleging that he was constructively discharged because he has Marfan's Syndrome. He received the

Notice of Right to Sue letter on September 26, 1999, and filed his complaint on December 21, 1999.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c). A genuine issue for trial exists only when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986). The Court must view all evidence in the light most favorable to the nonmoving party and draw all reasonable and justifiable inferences in favor of that party. *Id.* at 255, 106 S.Ct. 2505. However, if the evidence is merely colorable, or is not significantly probative, or merely raises "some metaphysical doubt as to the material facts," summary judgment may be granted. *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348 (1986).

DISCUSSION

The ADA prohibits discrimination "against a qualified individual with a disability because of the disability." 42 U.S.C. § 12112(a). As indicated under § 12112(b) of the ADA,

"not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or an employee" is considered discrimination, "unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A). *See Basith v. Cook County*, 241 F.3d 919, 926-27 (7th Cir. 2001)(citation omitted). In reasonable accommodation cases such as this one, a plaintiff must show that: (1) he was disabled; (2) his employer was aware of his disability; and (3) he was a qualified individual who, with or without reasonable accommodation, could perform the essential functions of the employment position. *Basith*, 241 F.3d at 927.

Under the ADA, a disability is defined as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). O'Loughlin contends that his condition renders him substantially limited in the major life activities of working and reproduction.

As it has been defined, "substantially limits" means that the person is either unable to perform a major life function, or is significantly restricted in the duration, manner, or

condition under which the individual can perform a particular major life activity, as compared to the average person in the general population. *See* 29 C.F.R. § 1630.2(j). Within the context of the major life activity of working, "substantially limits" means the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes. *Webb v. Clyde L. Choate Mental Health and Dev. Ctr.*, 230 F.3d 991, 998 (7th Cir. 2000) (quotation and citation omitted). "Thus an individual is not substantially limited in working just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent"; instead, "the impairment must substantially limit employment generally." 29 C.F.R. § 1630.2(j), App. (1999); *see Webb*, 230 F.3d at 998.

Whether an impairment in fact substantially limits a major life activity is an individualized determination that must be made on a case-by-case basis. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 566, 119 S.Ct. 2162 (1999). Plaintiffs must therefore present some evidence to demonstrate that the impairment limits their ability to perform an entire class of jobs. *EEOC v. Rockwell International Corporation*, 243 F.3d 1012, 2001 WL 225046, *3 (7th Cir. March 8, 2001). Although

proof that an impairment prevented a claimant from performing a particular job for a particular employer is insufficient to render him or her disabled under the ADA, in some cases the claimant's impairments are so severe that his or her substantial foreclosure from the job market is obvious. Id. (citing *DePaoli v. Abbott Lab.*, 140 F.3d 688, 673 (7th Cir. 1998).

The EEOC Interpretative Guidance on the ADA indicates that a weight lifting restriction substantially limits a major life activity. The Interpretive Guidance provides the following example:

> "[A]n individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs."

29 C.F.R. § 1630.2(j) App. (Interpretive Guidance on Title I of the Americans with Disabilities Act). Although the EEOC guidelines are not controlling, they "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," and are "entitled to great deference." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 74, 106 S.Ct. 2399 (1986) (internal citations omitted).

The EEOC interpretation conflicts with case law in this circuit and others holding that a lifting restriction alone is

insufficient to constitute a substantial limitation on the life activity of working as a matter of law. In *Contreras v. Suncast Corporation*, 237 F.3d 756, 763 (7th Cir. 2001), the court held that the plaintiff's 45 pound lifting restriction, by itself, did not substantially limit the plaintiff's employment options. Numerous other cases agree that a lifting restriction alone does not qualify as a disability. *See, e.g., Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 349 (4th Cir. 1996)(holding as a matter of law that a 25-pound lifting limitation does not constitute a significant restriction on the ability to lift, work, or perform any other major life activity); *Aucutt v. Six Flags Over Mid-America*, 85 F.3d 1311, 1319 (8th Cir. 1996)(holding that plaintiff's 25 pound lifting restriction did not constitute a significant restriction); *Ray v. Glidden Co.*, 85 F.3d 227, 228-29 (5th Cir. 1996)(holding that inability to continuously lift containers weighing on average 44-56 pounds does not render a person substantially limited in the major life activities of lifting or working); *Wooten v. Farmland Foods*, 58 F.3d 382, 384, 386 (8th Cir. 1995)(plaintiff not substantially limited in major life activity of working where plaintiff was restricted to light duty with no working in cold environment and no lifting items weighing more than 20 pounds).

O'Loughlin maintains that his condition leaves him substantially limited in the major life activity of working. He has emphasized in his briefs, however, that the only restriction on his activities is the 40-pound lifting restriction. Despite the EEOC regulations, this circuit has clearly held that such a lifting restriction, by itself, is not enough to be classified as a disability as a matter of law. Marfan's Syndrome is a terrible condition, but according to O'Loughlin, the only impact it has on his activities is the lifting restriction. Under the current law, this does not substantially limit his ability to work.

Furthermore, O'Loughlin has failed to present evidence that his impairment excludes him from a broad range of jobs. Although statistical evidence of the range of jobs from which a claimant is excluded is not a *per se* requirement to meet this obligation, *Rockwell International*, 243 F.3d 1012, 2001 WL 225046, at *3, O'Loughlin only asserts that his impairment excludes him from the class of jobs known as stock clerks. This is far from sufficient evidence that O'Loughlin is excluded from a broad class of jobs, and his impairment is not so severe that the class of jobs from which he is excluded is obvious.

Citing *Bragdon v. Abbott*, 524 U.S. 624, 638, 118 S.Ct. 2196 (1998), O'Loughlin creatively maintains that his condition

substantially limits the major life activity of reproduction. The Supreme Court held in *Bragdon* that HIV infection limited the major life activity of reproduction. *Id.* However, a potential disability must be evaluated with respect to the extent the physical impairment substantially limits the individual claimant's major life activities. *Sutton v. United Air Lines*, 527 U.S. 471, 483, 119 S.Ct. 2139, 2147 (1999). Disability is determined by the effect the impairment has on the individual. *Id.* Although the Court in *Bragdon* noted that "the disability definition does not turn on personal choice," the Court did point out that the plaintiff's HIV status controlled her decision not to have children. *Id*.

Since *Bragdon*, other courts have noted that a claimant's disability does not substantially limit reproduction when disability does not affect the claimant's decision of whether to have children or engage in sexual relations. *See, e.g., Gutwaks v. American Airlines*, No. 3:98-CV-2120-BF, 1999 WL 1611328, *4-5 (N.D. Tex. Sept. 2, 1999); *Reese v. American Food Service*, No. CIV.A. 99-1741, 2000 WL 1470212, *6 (E.D. Penn. Sept. 29, 2000). *But see Hiller v. Runyon*, 95 F.Supp.2d 1016, 1021 n. 2 (S.D. Iowa 2000) (noting that a claimant's choices regarding reproduction may have no bearing on the issue under *Bragdon*).

In this case, O'Loughlin presents no evidence that his condition has affected his reproductive choices. Dr. Wallis testified that an individual with Marfan's Syndrome has a 50% chance of passing it to any offspring, but O'Loughlin does not indicate whether this fact has affected his decision to have children. In fact, O'Loughlin has utterly failed to present any evidence that his condition has affected his reproductive choices, and the Court will not fill the void with assumptions. Accordingly, the Court cannot find that O'Loughlin is disabled because of the effect Marfan's Syndrome has had on his reproductive activities.

The parties also dispute whether O'Loughlin remains qualified for the position despite the lifting restriction and whether Dominick's made any effort to reasonably accommodate him. Under the ADA, an employer has a duty to offer reasonable accommodations for qualified persons with known physical disabilities, which would allow the employee to continue working, so long as the essential functions of the job are being performed with or without the accommodation, unless the needed and/or requested accommodations would impose an undue hardship on the employer. 42 U.S.C. § 12112(b)(5)(A). *See also, Beck v. University of Wisconsin Bd. of Regents*, 75 F.3d 1130, 1135-36 (7th Cir. 1996).

Viewing the facts in the light most favorable to O'Loughlin, factual issues may remain as to what the essential functions of the stocker position entailed and whether Dominick's engaged in any effort to reasonably accommodate him. However, as indicated above, O'Loughlin does not suffer from a disability as a matter of law. Accordingly, the Court may forego an examination of these issues.

CONCLUSION

Accordingly, Dominick's Motion for Summary Judgment is granted. The case is dismissed.

IT IS SO ORDERED.

Harry D. Leinenweber, Judge
United States District Court

Dated: _____